

CF:TH
F.# 2001R01640

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

NOTICE OF INTENT TO SEEK THE
DEATH PENALTY

- against -

01 CR 1367(S-3)(RJD)

GILBERTO CARABALLO,
also known as
"Carlos Caraballo"
and "Anthony Rodriguez,"

Defendant.

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Pursuant to the requirements of 18 U.S.C. § 3593(a) and 21 U.S.C. § 848(h), the United States hereby gives notice that it believes that the circumstances of this case are such that, in the event that the defendant GILBERTO CARABALLO, also known as "Carlos Caraballo," and "Anthony Rodriguez," is convicted of either (a) one or more of the capital offenses relating to the death of victim Jose Fernandez, also known as "Tris," or (b) the capital offense relating to the death of victim Edward Cortes, also known as "E.M.," a sentence of death is justified and that the United States will seek the death penalty. Specifically, the United States will seek a sentence of death for Count One of the Third Superseding Indictment (the "Indictment"), which charges conspiracy to commit murder in consideration for the receipt of, and as consideration for a promise and agreement to pay something

of pecuniary value, in violation of 18 U.S.C. § 1958; Count Two of the Indictment, which charges murder in consideration for the receipt of, and as consideration for a promise and agreement to pay something of pecuniary value, in violation of 18 U.S.C. § 1958; Count Three of the Indictment, which charges murder while engaging in a narcotics offense in violation of 21 U.S.C. § 848(e)(1)(A); and Count Ten of the Indictment, which charges murder while engaging in a narcotics offense in violation of 21 U.S.C. § 848(e)(1)(A).

Murder of Jose Fernandez
(Counts One and Two)

Pursuant to 18 U.S.C. § 3591(a)(2), the United States will rely on the following preliminary factors to establish the defendant's eligibility for the death penalty as to Counts One and Two of the Indictment:

1. Intentional Killing. The defendant intentionally killed the victim. 18 U.S.C. § 3591(a)(2)(A).
2. Intentional Participation in an Act Which Caused Death. The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and

the victim died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(C).

3. Intentional Engagement in an Act of Violence Which Created a Grave Risk of Death. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(D).

Pursuant to 18 U.S.C. §§ 3593(a)(2) and 3592(c), the United States will rely on the following statutory aggravating factors as justifying a sentence of death as to Counts One and Two of the Indictment:

1. Heinous, Cruel, or Depraved Manner of Committing Offense. The defendant committed the killing of Jose Fernandez, also known as "Tris," in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to Jose Fernandez, also known as "Tris." 18 U.S.C. § 3592(c)(6).

2. Procurement of Offense by Payment. The defendant procured the killing of Jose Fernandez, also known as "Tris," by payment, or promise of payment, of anything of pecuniary value. 18 U.S.C. § 3592(c)(7).

3. Substantial Planning and Premeditation. The defendant committed the killing of Jose Fernandez, also known as "Tris," after substantial planning and premeditation to cause the death of Jose Fernandez, also known as "Tris." 18 U.S.C. § 3592(c)(9).

In addition to the statutory aggravating factors set forth above, the United States will rely on the following non-statutory aggravating factors to justify a sentence of death as to Counts One and Two, pursuant to 18 U.S.C. § 3593(a)(2):

1. Future Dangerousness of the Defendant. The defendant is likely to commit criminal acts in the future which would be a continuing and serious threat to the lives and safety of other persons, including, but not limited to, inmates and correctional officers in an institutional correctional setting. The defendant has committed the acts alleged in the offenses charged in the Indictment, including the capital offenses, and in the statutory and non-statutory aggravating factors contained in this Notice, and, in addition thereto, has committed and exhibited acts and characteristics including but not limited to the following:

Low rehabilitative potential - The defendant has demonstrated a low potential for rehabilitation as evidenced by his longstanding involvement in

criminal activities, including but not limited to drug trafficking, violence, possession of deadly weapons, and all of the offenses, including the capital offenses, charged in the Indictment.

2. Lack of Remorse - During and after the commission of the offenses charged in the Indictment, the defendant, through his actions and statements, demonstrated a lack of remorse for his participation in the offenses.

3. Contemporaneous Convictions. The defendant has also been charged with the murder of Edward Cortes, also known as "E.M.," in an additional count of murder while engaging in a narcotics offense in violation of 21 U.S.C. § 848(e)(1)(A) as reflected in Count Ten of the Indictment. At a sentencing hearing the government will seek to prove this second murder as a non-statutory aggravating factor in the event of the defendant's conviction on either of Counts One or Two of the Indictment relating to the murder of Jose Fernandez, also known as "Tris."

4. Victim Impact Evidence. As reflected by the personal characteristics of the victim, Jose Fernandez, also known as "Tris," as an individual human being and the impact of the offense on the victim and the victim's family, the defendant caused loss, injury, and harm to the victim and the victim's family, see Payne v. Tennessee, 501 U.S. 808, 825-827 (1991), including, but not limited to, the following:

(a) Characteristics of victim. The defendant caused the death of Jose Fernandez, also known as "Tris," a 27-year-old man who enjoyed a strong relationship with his family, including his mother, his sister, his brother and his children.

(b) Impact of the offense on the family of the victim. The victim's family has suffered severe and irreparable harm. Jose Fernandez, also known as "Tris," provided emotional support to his entire family and financial support to his immediate family, including, most significantly, his children.

Murder of Jose Fernandez
(Count Three)

Pursuant to 21 U.S.C. §§ 848(h) and 848(n)(1), the United States will rely on the following preliminary factors to establish the defendant's eligibility for the death penalty as to Count Three of the Indictment:

1. Intentional Killing. The defendant intentionally killed the victim. 21 U.S.C. § 848(n)(1)(A).

2. Intentional Engagement in Conduct With the Intent to Kill Which Resulted in Death. The defendant intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim. 21 U.S.C. § 848(n)(1)(C).

3. Intentional Engagement in Conduct Creating a Grave Risk of Death Which Resulted in Death. The defendant intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and which resulted in the death of the victim. 21 U.S.C. § 848(n)(1)(D).

Pursuant to 21 U.S.C. §§ 848(h) and 848(n), the United States will rely on the following statutory aggravating factors as justifying a sentence of death as to Count Three of the Indictment:

1. Procurement of Offense by Payment. The defendant procured the killing of Jose Fernandez, also known as "Tris," by payment, or promise of payment, of anything of pecuniary value. 21 U.S.C. § 848(n)(6).

2. Substantial Planning and Premeditation. The defendant committed the killing of Jose Fernandez, also known as "Tris," after substantial planning and premeditation. 21 U.S.C. § 848(n)(8).

3. Heinous, Cruel, or Depraved Manner of Committing Offense. The defendant committed the killing of Jose Fernandez, also known as "Tris," in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical

abuse to Jose Fernandez, also known as "Tris." 21 U.S.C. § 848(n)(12).

In addition to the statutory aggravating factors set forth above, the United States will rely on the following non-statutory aggravating factors to justify a sentence of death as to Count Three of the Indictment, pursuant to 21 U.S.C. § 848(h):

1. Nature of the Offense. The defendant killed Jose Fernandez, also known as "Tris," while engaged in an offense punishable under 21 U.S.C. § 841(b)(1)(A), to wit, conspiracy to distribute and possess with intent to distribute five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, and fifty grams or more of a substance containing cocaine base, a Schedule II controlled substance.

2. Future Dangerousness of the Defendant. The defendant is likely to commit criminal acts in the future which would be a continuing and serious threat to the lives and safety of other persons, including, but not limited to, inmates and correctional officers in an institutional correctional setting. The defendant has committed the acts alleged in the offenses charged in the Indictment, including the capital offenses, and in the statutory and non-statutory aggravating factors contained in this Notice, and, in addition thereto, has committed and

exhibited acts and characteristics including but not limited to the following:

Low rehabilitative potential - The defendant has demonstrated a low potential for rehabilitation as evidenced by his longstanding involvement in criminal activities, including but not limited to drug trafficking, violence, possession of deadly weapons, and all of the offenses, including the capital offenses, charged in the Indictment.

2. Lack of Remorse - During and after the commission of the offenses charged in the Indictment, the defendant, through his actions and his statements, demonstrated a lack of remorse for his participation in the offenses.

3. Contemporaneous Convictions. The defendant has also been charged with the murder of Edward Cortes, also known as "E.M.," in an additional count of murder while engaging in a narcotics offense in violation of 21 U.S.C. § 848(e)(1)(A) as reflected in Count Ten of the Indictment. At a sentencing hearing the government will seek to prove this second murder as a non-statutory aggravating factor in the event of the defendant's conviction on Count Three of the Indictment relating to the murder of Jose Fernandez, also known as "Tris."

4. Victim Impact Evidence. As reflected by the personal characteristics of the victim, Jose Fernandez, also known as "Tris," as an individual human being and the impact of the offense on the victim and the victim's family, the defendant caused loss, injury, and harm to the victim and the victim's family, see Payne v. Tennessee, 501 U.S. 808, 825-827 (1991), including, but not limited to, the following:

(a) Characteristics of victim. The defendant caused the death of Jose Fernandez, also known as "Tris," a 27-year-old man who enjoyed a strong relationship with his family, including his mother, his sister, his brother and his children.

(b) Impact of the offense on the family of the victim. The victim's family has suffered severe and irreparable harm. Jose Fernandez, also known as "Tris," provided emotional support to his entire family, and financial support to his immediate family, including, most significantly, his children.

Murder of Edward Cortes
(Count Ten)

Pursuant to 21 U.S.C. §§ 848(h) and 848(n)(1), the United States will rely on the following preliminary factors to establish the defendant's eligibility for the death penalty as to Count Ten of the Indictment:

1. Intentional Killing. The defendant intentionally killed the victim. 21 U.S.C. § 848(n)(1)(A).

2. Intentional Engagement in Conduct With the Intent to Kill Which Resulted in Death. The defendant intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim. 21 U.S.C. § 848(n)(1)(C).

3. Intentional Engagement in Conduct Which Created a Grave Risk of Death and Which Resulted in Death. The defendant intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and which resulted in the death of the victim. 21 U.S.C. § 848(n)(1)(D).

Pursuant to 21 U.S.C. §§ 848(h) and 848(n), the United States will rely on the following statutory aggravating factors as justifying a sentence of death as to Count Ten of the Indictment:

1. Grave Risk of Death. In the commission of the killing of Edward Cortes, also known as "E.M.," the defendant knowingly created a grave risk of death to one or more persons in addition to the murder victim. 21 U.S.C. § 848(n)(5).

2. Procurement of Offense by Payment. The defendant procured the killing of Edward Cortes, also known as "E.M.," by payment, or promise of payment, of anything of pecuniary value. 21 U.S.C. § 848(n)(6).

3. Pecuniary Gain. The defendant committed the killing of Edward Cortes, also known as "E.M.," as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. 21 U.S.C. § 848(n)(7).

4. Substantial Planning and Premeditation. The defendant committed the killing of Edward Cortes, also known as "E.M.," after substantial planning and premeditation. 21 U.S.C. § 848(n)(8).

In addition to the statutory aggravating factors set forth above, the United States will rely on the following non-statutory aggravating factors to justify a sentence of death as to Count Ten of the Indictment, pursuant to 21 U.S.C. § 848(h):

1. Nature of the Offense. The defendant killed the victim while engaged in an offense punishable under 21 U.S.C. § 841(b)(1)(A), to wit, conspiracy to distribute and possess with intent to distribute five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, and fifty grams or more of a substance containing cocaine base, a Schedule II controlled substance.

2. Future Dangerousness of the Defendant. The defendant is likely to commit criminal acts in the future which would be a continuing and serious threat to the lives and safety of other persons, including, but not limited to, inmates and

correctional officers in an institutional correctional setting. The defendant has committed the acts alleged in the offenses charged in the Indictment, including the capital offenses, and in the statutory and non-statutory aggravating factors contained in this Notice, and, in addition thereto, has committed and exhibited acts and characteristics including but not limited to the following:

Low rehabilitative potential - The defendant has demonstrated a low potential for rehabilitation as evidenced by his longstanding involvement in criminal activities, including but not limited to drug trafficking, violence, possession of deadly weapons, and all of the offenses, including the capital offenses, charged in the Indictment.

2. Lack of Remorse - After the commission of the offenses charged in the Indictment, the defendant, through his actions and statements, demonstrated a lack of remorse over having committed the offenses.

3. Contemporaneous Convictions. The defendant has also been charged with the murder of Jose Fernandez, also known as "Tris," in a count of conspiracy to commit murder in consideration for the receipt of, and as consideration for a promise and agreement to pay something of pecuniary value, in violation of 18 U.S.C. § 1958; a count of murder in consideration

for the receipt of, and as consideration for a promise and agreement to pay something of pecuniary value, in violation of 18 U.S.C. § 1958; and an additional count of murder while engaging in a narcotics offense in violation of 21 U.S.C. § 848(e)(1)(A) as reflected in Counts One through Three of the Indictment. At a sentencing hearing the government will seek to prove this second murder as a non-statutory aggravating factor in the event of the defendant's conviction on Count Ten of the Indictment relating to the murder of Edward Cortes, also known as "E.M."

4. Victim Impact Evidence. As reflected by the personal characteristics of the victim, Edward Cortes, also known as "E.M.," as an individual human being and the impact of the offense on the victim and the victim's family, the defendant caused loss, injury, and harm to the victim and the victim's family, see Payne v. Tennessee, 501 U.S. 808, 825-827 (1991), including, but not limited to, the following:

(a) Characteristics of victim. The defendant caused the death of Edward Cortes, also known as "E.M.," a 25-year-old man who enjoyed a strong relationship with his family, including his parents, his brothers, his sister, his wife and his child.

(b) Impact of the offense on the family of the victim. The victim's family has suffered severe and irreparable harm. Edward Cortes, also known as "E.M.," provided financial and emotional support to his family, including his wife and child.

The Government further gives notice that in support of imposition of the death penalty on Counts One, Two, Three and Ten, it intends to rely upon all the evidence admitted by the Court at the guilt phase of the trial and the offenses of conviction as described in the Indictment as they relate to the background and character of the defendant, his moral culpability, and the nature and circumstances of the offenses charged in the Indictment.

Dated: May 14, 2004
Brooklyn, New York

Respectfully submitted,


ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY

cc: Henry Ironman, Esq.
Harry Trainor, Esq.